(17)

Supreme Court, U.S.
FILED
FEB 28 2003
OFFICE OF THE CLERK

No. 02-575

IN THE

Supreme Court of the United States

NIKE, INC., ET AL.,

Petitioners,

v.

MARC KASKY,

Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF CALIFORNIA

BRIEF OF THE CENTER FOR THE ADVANCEMENT OF CAPITALISM AS *AMICUS CURIAE* SUPPORTING THE PETITIONERS

THOMAS A. BOWDEN
Counsel of Record
20 South Charles Street
8th Floor, Sun Life Building
Baltimore, MD 21201
(410) 727-4300

Counsel for Amicus Curiae

19 pp

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. There is no philosophic justification for the commercial speech doctrine. 3

II. There is no historical justification for the commercial speech doctrine, nor is one required under the Ninth Amendment. 7

III. The commercial speech doctrine is not necessary to advance the state's interest in preventing fraud. 14

CONCLUSION 16

TABLE OF AUTHORITIES

Cases:

44 Liquormart, Inc. v. Rhode Island,
517 U.S. 484 (1996).....2, 7, 8, 14
Bolger v. Youngs Drug Prods. Corp.,
463 U.S. 60 (1983).....4, 14
Central Hudson Gas & Elec. Co. v. Public Serv. Comm'n,
447 U.S. 557 (1980).....3, 4, 7, 14
Griswold v. Connecticut,
381 U.S. 479 (1965).....8, 9
Kasky v. Nike,
27 Cal.4th 939 (2002).....13
Kasky v. Nike,
93 Cal. Rptr. 2d 854 (Cal. Dist. Ct. App. 2000).... 12, 13
McCulloch v. Maryland,
17 U.S. 316 (1819).....10, 11
Ohralik v. Ohio State Bar Ass'n,
436 U.S. 447 (1978).....5, 6

Constitutional Provisions:

U.S. Const. Art. I, § 8, cl. 18.....10, 11
U.S. Const. Amdt. I.....*passim*
U.S. Const. Amdt. V.....8
U.S. Const. Amdt. IX.....3, 7-10, 12
U.S. Const. Amdt. XIV.....8, 11
Cal. Const., Art. I, §2(a).....12

Miscellaneous:

Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 VA. L. REV. 2

IN THE

Supreme Court of the United States

No. 02-575

NIKE, INC., ET AL.
Petitioners,

v.

MARC KASKY,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

INTEREST OF AMICUS CURIAE[1]

The Center for the Advancement of Capitalism ("CAC") is a District of Columbia corporation organized in 1998, and exempt from income tax under Section 501(c)(4) of the Internal Revenue Code. CAC's mission is to present to policymakers, the judiciary and the public analyses to assist in the identification and protection of the individual rights of the American people. CAC applies Ayn Rand's philosophy of Objectivism to contemporary public policy issues, and provides empirical studies and theoretical commentaries on the impact of legal and regulatory institutions upon the rights of American citizens.

[1] CAC files this brief with the consent of all parties. The letters granting blanket consent have been filed concurrently in both cases. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amicus* or its counsel, make a monetary contribution to the preparation or submission of this brief.

The effect the decision below on commercial speech is a subject of great interest to CAC and its supporters. A fundamental tenet of CAC's mission is the support of individual rights as an organizing principle of society. The case at bar directly challenges the right of individuals, when acting through a corporation, to engage in unshackled speech on matters related to their economic self-interest. For this reason, CAC maintains a critical interest in the outcome of this case.

SUMMARY OF ARGUMENT

Nike argues that the California Supreme Court improperly applied the commercial speech doctrine. This argument neglects the essential problem of the case—the commercial speech doctrine itself. Since this Court "plucked the commercial speech doctrine out of thin air"[2] more than 60 years ago, the lower courts have struggled to apply a vague, yet seemingly inflexible standard for deciding which speech deserves First Amendment protection and which does not. The outcome of the decision below is typical. A bare majority of the California Supreme Court held, in essence, that the identity and motive of a speaker alone deny full First Amendment speech protection. While this Court could adopt a narrow remedy tailored to address Nike's grievances, a proper approach would be to admit error and abolish the judicial distinction between "commercial" and "noncommercial" speech in its entirety.

JUSTICE THOMAS has already issued this call. Six years ago, the Court delivered a unanimous but fractured judgment in 44 *Liquormart v. Rhode Island*.[3] The Court held that a state ban on liquor advertising ran afoul of the *Central Hudson* test[4] for restricting commercial speech. In

[2] Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 VA. L. REV. 627 (1990).
[3] 517 U.S. 484 (1996).
[4] *Central Hudson Gas & Elec. Co. v. Public Serv. Comm'n*, 447 U.S. 557 (1980).

concurring with the Court's judgment, JUSTICE THOMAS argued persuasively that *Central Hudson* itself should be abandoned as the governing rule since, as he put it, "I do not see a philosophical or historical basis for asserting that 'commercial' speech is of 'lower value' than 'noncommercial' speech."[5] *Amicus* agrees.

The proof can be found, *amicus* believes, in the concept of individual rights as implemented by the Ninth Amendment, which extends the protection of individual rights to specific applications not actually enumerated in the Constitution itself. Rather than chase the ghosts of historical figures, the Court would do well to recognize that the Ninth Amendment provides adequate proof that the Constitution's framers expected this Court to provide absolute protection for individual rights without an extended inquiry into original intent or the common practices of past societies.

In overruling the commercial speech doctrine, the Court should recognize the logical relationship between economic motives, individual rights, and the federal Constitution's purpose in protecting free speech by protecting all non-fraudulent and non-defamatory speech, whether private or commercial. At the same time, the Court ought to shift the burden back to the state to establish a valid regulatory interest at the outset, rather than allow specious claims such as Marc Kasky's to create an unworkable patchwork of contradictory judicial precedents.

ARGUMENT

I. There is no philosophic justification for the commercial speech doctrine.

While Kasky's claims against Nike lack merit, his action is instructive in identifying the fundamental flaw in the commercial speech doctrine's violation of the right to free speech.

[5] 517 U.S. at 522.

In maintaining the modern commercial speech doctrine, the Court has failed to recognize that individuals value their membership in society largely for the selfish economic benefits that come from free trade with others. In a society that recognizes individual rights, all interactions are voluntary, based on mutual exchange to mutual benefit. It is only in a system of free and un-coerced exchange that individuals can properly trade to mutual benefit. Accordingly, one's political interests and one's economic interests are joined, sharing the same selfish motivation and deserving the same protection.

Yet in failing to protect the speech necessary to defend an individual's economic relationships with others, the Court has relegated self-interested speech to an intellectual ghetto. In the case before the Court, the California Supreme Court holds that because Nike, as a corporation, is acting out of its own economic self-interest, its employees and shareholders ultimately have no right to submit their views to the public. This view is false.

The standard-bearer for the commercial speech doctrine, *Central Hudson*, held that "commercial" speech is any expression "related solely to the economic interests of the speaker and its audience."[6] Building on that foundation, *Bolger v. Youngs Drug Product Corp.* decided that "the speaker's economic motivation" is one of three critical factors in determining whether speech is commercial.[7] Read in tandem, the message is clear: speech motivated by economic self-interest is inherently less deserving of constitutional protection than other classes of speech.

There is no proof as to *why* economic motivation should cause speech to be suspect. A number of decisions argue that because commercial speech is more easily verified for accuracy than noncommercial speech, the risks posed by

[6] 447 U.S. at 561.
[7] 463 U.S. 60, 66-67 (1983).

government restraints are not as acute. This makes little sense. The reason for the private-commercial speech dichotomy is a product of modern government's schizophrenic view of its citizens. On the one hand, individuals are presumed to be well-informed when it comes to political decision-making; on the other hand, these same individuals are considered incompetent victims when it comes to economic decision-making. This leads to what the Court acknowledges are paternalistic regulations which attempt to restrict the flow of information to consumers in order to manipulate their economic choices.

The commercial speech doctrine is such a paternalistic policy. As a matter of ethics, the doctrine endorses the beliefs of people like Kasky—that political speech like his is deemed to be in the "public" interest, while Nike's speech is automatically suspect because it is motivated by commercial self-interest.

Yet political and economic speech are equally essential to the success of an individual's life. The Constitution should not be interpreted to uphold the sanctity of an individual's right to speak on issues affecting his interests while simultaneously restraining him from speaking to advance his trade. Yet the commercial speech doctrine does just that. Inter alia, this Court has claimed that recognizing the equality of commercial and political speech will somehow "devitalize" the First Amendment. Consider the following passage from *Ohralik v. Ohio State Bar Association*:

> We have not discarded the "common-sense" distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech. To require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with

> respect to the latter kind of speech. Rather than subject the First Amendment to such a devitalization, we instead have afforded commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of noncommercial expression.[8]

The claim that there exists a "common sense" distinction between commercial and non-commercial speech stands only if one rejects the importance of free speech in advancing one's legitimate economic interests. This artificial distinction collapses when one recognizes that an individual has a right to his life and the legitimate steps necessary to preserve and advance it; an individual must have the right to integrate all aspects of his life. The real "dilution" of the right to free speech, if not its outright violation, takes place when different speakers are afforded different levels of protection based on their identity and viewpoint. The decision below dilutes Nike's rights simply because it is a corporation acting in its economic self-interest.

If an individual Nike shareholder were to comment on the company's labor practices, it is doubtful that his speech would be labeled "commercial" and thereby unprotected by the First Amendment. How then does this individual right disappear simply because a shareholder has spoken though his authorized agents at Nike headquarters? It doesn't. Corporations allow individuals to distinguish their businesses legally from their personal affairs. This distinction, however, does not erode the Constitutional rights of a corporation's owners. Nike is not an evil, soulless demon, but the legal agent of thousands of shareholders and employees. Nike's speech is ultimately *their* speech.

---

[8] 436 U.S. 447, 455-456 (1978).

II. There is no historical justification for the commercial speech doctrine, nor is one required under the Ninth Amendment.

In its unanimous judgment in 44 *Liquormart v. Rhode Island,* the Court held that a state ban on liquor advertising ran afoul of the *Central Hudson* test for restricting commercial speech. While JUSTICE THOMAS argued that *Central Hudson* should be abandoned as the governing rule[9], in a separate concurrence, JUSTICE SCALIA countered that more historical evidence was required before the Court could abandon the commercial speech doctrine. Specifically, we should look to the "long accepted practices of the American people" with respect to free speech. JUSTICE SCALIA chides the parties and *amici* in 44 *Liquormart* for not discussing such historical factors:

> The *amicus* brief on behalf of the American Advertising Federation et al. did examine various expressions of view at the time the First Amendment was adopted; they are consistent with First Amendment protection for commercial speech, but certainly not dispositive. I consider more relevant the state legislative practices prevalent at the time the First Amendment was adopted, since almost all of the States had free-speech constitutional guarantees of their own, whose meaning was not likely to have been different from the federal constitutional provision derived from them. Perhaps more relevant still are the state legislative practices at the time the Fourteenth Amendment was adopted, since it is most improbable that that adoption was meant to overturn any existing national consensus

---

[9] 517 U.S. at 518 (THOMAS, J., concurring in part and concurring in judgment).

> regarding free speech. Indeed, it is rare that any nationwide practice would develop contrary to a proper understanding of the First Amendment itself—for which reason I think also relevant any national consensus that had formed regarding state regulation of advertising *after* the Fourteenth Amendment, and before this Court's entry into the field.[10]

The yearning for historical context misses the point. It should not be necessary for Nike to prove the existence of its First Amendment rights by identifying specific historical statements in support of "commercial" speech. Indeed, where would one find such "dispositive" evidence? Presumably, not every state legislature—at any given time—holds identical views regarding commercial speech, the Fourteenth Amendment, or any other identifiable topic. It has never been necessary in other First Amendment contexts for a challenged party to demonstrate positively that their expressive acts represent a "long accepted practice." Under such a requirement, this Court would never have recognized First Amendment protections for flag burning, the distribution of adult magazines, or student expression on school grounds.

In short, a lack of historical evidence must not foreclose protection for "commercial" speech. But if evidence were needed, the Ninth Amendment provides it. The amendment provides "The enumeration, in this Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." Historically, the Court has been reluctant to read much into this amendment, choosing to uphold non-enumerated rights under the Fifth and Fourteenth Amendments instead. Then, in June of 1965, the Court handed down its radical decision in *Griswold v. Connecticut*[11], wherein the Court upheld the unenumerated

---

[10] 517 U.S. at 517 (SCALIA, J., concurring in part and concurring in judgment).

[11] 381 U.S. 479 (1965).

right of a married couple to use contraception, availing itself of the Ninth Amendment in rendering its holding. In a concurring opinion, Justice Goldberg, joined by Justice Brennan and Chief Justice Warren, wrote:

> Nor am I turning somersaults with history in arguing that the Ninth Amendment is relevant in a case dealing with a State's infringement of a fundamental right. While the Ninth Amendment—and indeed the entire Bill of Rights—originally concerned restrictions upon federal power, the subsequently enacted Fourteenth Amendment prohibits the Sates as well from abridging fundamental personal liberties. And, the Ninth Amendment, in indicating that not all such liberties are specifically mentioned in the first eight amendments, is surely relevant in showing the existence of other fundamental personal rights, now protected from state, as well as federal, infringement. In sum, the Ninth Amendment simply lends strong support to the view that the "liberty" protected by the Fifth and Fourteenth Amendments from infringement by the Federal Government or the States is not restricted to rights specifically mentioned in the first eight amendments. Cf. United Public Workers v. Mitchell, 330 U.S. 75. 94 - 95.[12]

In the case now before the Court, the Ninth Amendment provides the key to understanding the scope and reach of the First Amendment.

The express reason for including the Ninth Amendment was to assuage fears that adoption of the preceding eight amendments would limit individual rights to only those specifically enumerated. Yet in the 210 years since Congress

---

[12] 381 U.S. at 487 (Goldberg, J., concurring).

proposed the Bill of Rights, there has been little judicial effort to make effective and proper use of the Ninth Amendment. Presumably, there is a fear that reliance on the Ninth Amendment would lead the judiciary to manufacture non-existent rights.

In the context of a constitution, a clause either explicitly provides for a situation or authorizes a broad inquiry into circumstances that change over time. It would be most peculiar for any section of the Constitution to grant broad authority, only to have a body such as this Court hold precisely the opposite—that the clause can be used only when explicitly authorized by historical evidence.

The best way to understand the Ninth Amendment's role is to examine one of this Court's earliest efforts at constitutional construction, *McCulloch v. Maryland*.[13] Unlike this case, which deals with rights, *McCulloch* discussed congressional powers under Article I, specifically whether Congress possessed adequate authority to charter a corporation. A unanimous Court held that Congress possessed such authority under the Necessary and Proper Clause.[14] In interpreting the clause, the Court said that for Congress to execute its specifically enumerated powers, it must be permitted to employ "convenient, or useful, or essential" methods that the Constitution's Framers may not have envisioned.[15] Today, this concept is axiomatic.

Just as the Necessary and Proper Clause gives life to Congress' enumerated powers, the Ninth Amendment authorizes the Court to identify and protect the specific activities implicit in the moral principle of the right to life. The amendment is designed to animate the principle of individual rights that stands at the heart of American government. In the present case, the relationship is readily

[13] 17 U.S. 316 (1819).
[14] U.S. CONST., Art. I, § 8, cl. 18.
[15] 17 U.S. at 414.

understood. The Framers may not have considered whether the First Amendment extended to "commercial" speech—just as the Framers may not have considered whether Congress could form a corporation—but that does not mean that there is no such right. As discussed above, an individual's commercial and political interests are inseparable. There is no distinct class of "commercial" interests that can be segregated from the remainder of man's existence. Paralleling *McCulloch*, a crucial question before the Court is whether identifying and protecting the value of "commercial" speech is essential to effectively carry out the First Amendment. *Amicus* believes it is.

Analyzed in this light, the issue of historical evidence and traditional practices is moot, because a proper Ninth Amendment analysis looks towards man's rights as they are properly exercised. Whether "commercial" speech was protected at the time the First or Fourteenth Amendment was adopted is of far less concern than whether protection of such speech properly carries out the intended goal of the First Amendment. This question is discussed above. A related question, however, is whether the constitution itself should be expected to provide for all future circumstances related to its interpretation.

The *McCulloch* Court, in looking at the Necessary and Proper Clause, recognized what the Constitution could do, and more importantly, what it could not do: "To have prescribed the means by which government should, in all future time, execute its powers, would have been to change, entirely, the character of the [Constitution], and *give it the properties of a legal code.*"[16] The same holds true for the Ninth Amendment. It serves as a direction to identify the scope of individual rights without resorting to explicit Constitutional enumerations, original intent, or historical practice. The

[16] Id. at 415. [emphasis added]

Ninth Amendment is the "necessary and proper" clause for individual rights.

The Ninth Amendment creates a presumption in favor of rationally provable, yet unenumerated rights. In the context of the present case, for instance, Kasky must demonstrate an established governmental interest that convincingly overrules the First and Ninth Amendment presumptions that Nike's speech is protected. Kasky has not done so. The government has no legitimate interest in regulating the kind of advertising at issue here.

The intermediate appellate court in California saw Kasky's efforts for what they were, declaring: "We take judicial notice that this debate calls for action ranging from international labor standards to consumer boycotts. Information about the labor practices of Nike's overseas plants thus constitutes data relevant to a controversy of great public interest in our times."[17] Even if the First Amendment did not protect overtly "commercial" speech, it would still prevent the state from trying to rig the outcome of a public debate. To that end, the California state constitution is more explicit in its enumeration of free speech rights than the federal Constitution: "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press."[18] Coupled with the federal guarantees of the First and Ninth Amendments, Kasky can not rebut the strong presumption in favor of protecting Nike's speech rights.

In his original complaint, Kasky sought relief on grounds that Nike falsely claimed that it "is doing a good job and 'acting morally'" with respect to international labor practices. [19] Since Kasky disclaims personal knowledge of

---

[17] *Kasky v. Nike*, 93 Cal. Rptr. 2d 854, 861 (Cal. Dist. Ct. App. 2000).
[18] CAL. CONST., art. I, § 2(a).
[19] *See Kasky*, 93 Cal. Rptr. 2d at 857.

BEST AVAILABLE COPY

the actual facts concerning Nike's conduct, it is safe to conclude that his action was motivated solely by his pre-existing animus for Nike. The decision below considers Kasky's moral outrage sufficient basis to pursue an unfair competition claim, "because Nike sells shoes—and its defense against critics may help sell those shoes."[20] Such reasoning is consistent with the existing commercial speech doctrine, because in key precedents this Court has identified economic motives as sufficient to sever "commercial" speech from the First Amendment's protections. Yet such reasoning denies one of Nike's most essential rights; the right to communicate free from government restraint.

If anything, this case exposes the California legislature's error in permitting "private attorney general" actions, such as Kasky's, in the first place. In the context of republican government, a state interest is established after careful consideration, debate, oversight, and review. The legislative process is inherently slow and deliberative, in part to prevent a rush to judgment on matters of public debate. Once laws are enacted, it becomes the responsibility of elected and appointed officials to interpret and execute the laws in a consistent, objective manner. Yet Kasky, a private citizen who alleges no personal injury and professes no personal knowledge of the facts, seeks to interpret a broad anti-fraud statute in order to meet his *personal* interests. This is not the establishing of a valid government interest, but rather an exercise in whim-worship.

Ultimately, the responsibility in this case does not lie with Kasky or the California legislature, but with the California Supreme Court, and indeed this Court as well. The commercial speech doctrine is fundamentally a judicial invention that is little more than case law with "nothing more than policy intuition to support it."[21] In the absence of

---

[20] *Kasky v. Nike*, 27 Cal.4th 939, 971 (2002) (Chin, J., dissenting).
[21] *44 Liquormart*, 517 U.S. at 517 (SCALIA, J., concurring in part and concurring in judgment).

Central Hudson, *Bolger*, and the decision below, Kasky has no valid cause of action in the California courts. Kasky's claims find support neither in the plain language of the statutes, the state or federal constitutions nor the common law definition of fraud. Only by clinging to the commercial speech doctrine, as articulated by the California Supreme Court, have Kasky's grievances remained in the judicial arena.

III. The commercial speech doctrine is not necessary to advance the state's interest in preventing fraud.

The remaining issue with respect to overruling the commercial speech doctrine is how such action would affect the state's interest in preventing and redressing fraud. Kasky's underlying argument is that Nike's speech constituted "consumer" fraud. Removing the commercial speech doctrine from Kasky's arsenal obviously destroys this argument, since Kasky himself alleges no personal injury, and can demonstrate no injury to any other individual consumer. But outside the limits of this case, the commercial speech doctrine does not advance the state's ability to prevent fraud because the doctrine is an illegitimate prior restraint on speech, and not a means of identifying and punishing actual fraud. The doctrine is an initiation of force, not protection from it.

Fraud requires, in part, that an injured party be induced to rely on misleading statements to his detriment. Here, Kasky never alleges Nike consumers relied on false statements to their detriment. Instead, he argues that Nike's issue advertising *may* mislead consumers into holding an unjustified favorable image of the company, which in turn *might* lead to sales of Nike products in the future. This is, at best, a tortured definition of fraud. Under Kasky's theory, a consumer would have a cause of action for fraud against Nike despite neither buying Nike shoes, nor ever

considering the purchase of Nike shoes in the future. In essence, Kasky equates simple speech with overt fraud.

By allowing critics such as Kasky to shackle the speech of Nike—creating what amounts to an illegitimate prior restraint—the Court would sanction Kasky's machinations, thus allowing him to manipulate the public into reaching his conclusion, thus denying consumers the right to form independent judgments. This exercise may please Kasky and his fellow Nike opponents, but it does nothing to combat actual fraud.

CONCLUSION

Nike is an innocent victim of this Court's rigid insistence on maintaining the commercial speech doctrine. While the company's grievances could be settled by granting the narrow relief sought in its petition, the Court should protect future Nikes from having to defend themselves from any more judicially-created limits on the First Amendment. This can be accomplished by recognizing that the sovereign citizens of the United States have a constitutionally guaranteed right to speech that is not fraudulent or defamatory. Hence, the commercial speech doctrine must fall.

In the absence of the commercial speech doctrine, Marc Kasky possesses no valid cause of action under California law. The judgment of the California Supreme Court must be reversed, and the Superior Court's dismissal of Kasky's complaint should be reinstated.

Respectfully Submitted,

THOMAS A. BOWDEN
Counsel of Record
20 South Charles Street
8th Floor, Sun Life Building
Baltimore, MD 21201
(410) 727-4300

Counsel for Amicus Curiae

Dated: February 28, 2003.